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CHICAGO-KENT LAW REVIEW

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THE TRUMP ADMINISTRATION AND ADMINISTRATIVE LAW

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Contrary to so-called unitary executive theory, Article II does not guarantee presidents the power to control federal criminal prosecution, a supervisory role Congress has placed by statute with the Attorney General. Nor is Congress without authority to protect federal prosecutors from policy-based dismissals. Rule-of-law values embodied in our system of checks and balances could alone justify these conclusions. But the same conclusions follow also from close attention to the entirety of the relevant constitutional text and from an understanding of how the Founding generation would have understood the relationship between executive power and criminal prosecution. In contemplating the newly proposed constitutional text between 1787 and 1789, those Americans enfranchised to vote on its ratification would have brought to their understanding of “executive power” not just dictionary definitions, but also their experience of living under executive power as exercised in Great Britain, in the colonies, and under state constitutions. They would have understood prosecution to be a form of judicial power, and the “original public meaning” of Article II executive power would not have guaranteed presidents the power to control prosecutorial discretion.

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Established public law principles are under strain from the prospect of Brexit in the United Kingdom and the Trump Administration in the United States. In the United Kingdom the Parliament is playing an increasingly important role in overseeing the Government, and the judiciary is beginning to support democratic accountability in executive policymaking. In the United States, possible statutory changes and the power of the president to reshape the public administration are of concern. Although in the United States the most draconian measures will likely die with the return of the House to Democratic Party control, they may remain on the wish list of advocates of deregulation. In the United Kingdom no general statute requires a notice-and-comment process with public input and reason-giving, but the judiciary is beginning to view public involvement as a way to promote the democratic accountability of executive policymaking. If these developments were

given a statutory base in the Brexit bill, the United Kingdom could achieve enhanced public accountability without the admitted weaknesses of a referendum. In the United States the notice-and-comment provisions of the APA require openness to public input and reason-giving by regulators. The courts explicitly invoke democratic values to justify rulemaking procedures that require transparency, public participation, and reason-giving. American procedural requirements strike a balance between democratic accountability and policymaking discretion that could help the United Kingdom craft more democratically responsive procedures. However, if legislative and executive branch changes in the United States succeed, we may see a reversal where the United Kingdom moves toward rulemaking procedures that are more accountable to the public at the same time as the United States moves away from rulemaking and operates in a less transparent manner. The worry in the United Kingdom is that the transition to the post-Brexit world will be only weakly informed by thoughtful input from the public. The worry in the United States is that executive policymaking will become increasingly difficult and subject to challenge.

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The Trump administration has used government information in more cynical ways than its predecessors. For example, it has removed certain information from the public domain, scrubbed certain terminology from government web sites, censored scientists, manipulated public data, and used “transparency” initiatives as a pretext for anti-regulatory policies, particularly environmental policy. This article attempts to tease out an emerging “information policy” for the Trump administration, explain how it departs from the information policies of predecessors, and evaluate the extent to which both legal and non-legal mechanisms might constrain executive discretion.

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Bureaucratic resistance is a historically unexceptional feature of the administrative state. What is striking is the extent to which it has become publicly defiant under the Trump Administration. Civil servants are openly defying executive directives in their official capacity, despite strong norms to the contrary. The social practice raises both parallels and contrasts to civil disobedience by private citizens; it thus similarly raises the need for sustained scholarly debate. This article seeks to isolate the phenomenon of civil servant disobedience conceptually and begin an exploration into its normative implications. In particular, it considers the ideal of a reciprocal hierarchy, whereby political appointees consult the expertise and experience of career staff as required by statute. This ideal may help to inform evaluations of civil servant disobedience as a form of bureaucratic process-perfection alongside other legitimating criteria. These factors, however, might actually suggest that disobedience is usually difficult to justify in practice.

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This article investigates the role of cost-benefit analysis during an antiregulatory period. The period since 2016 has seen several new developments, including the first vigorous use by Congress of its power to overturn recently issued regulations and the creation of novel deregulatory mechanisms layered on top of cost-benefit analysis. This period also contains important examples of sharply reversed CBAs, in which regulations that were said to have large net benefits under Obama are instead said to have net costs under Trump. The Trump Administration’s regulatory review initiatives focus heavily on costs, with limited attention to benefits. Case studies of three high-profile regulations show that the economic analysis of one is seriously defective, another admits to having severe limitations, and a third systematically reduces the scale of benefits. Some of these characteristics may be analytically defensible, others seemingly are not. It is even harder to connect Congress’s recent uses of the Congressional Review Act to either a concern about net

benefits or even a desire to reduce the economic burdens of regulation. Thus, cost-benefit analysis seems overall a marginal part of current regulatory policymaking.

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When new administrations arrive and consider agency policy changes, they often must choose what actions to take in court or through regulatory process. They may seek to stay an existing regulation, rescind, or possibly replace it. This article assesses strategic uses of, and responses to, agencies that pursue deregulatory roll-backs through a splintered series of steps. Through such splintering, agencies sometimes seek to avoid direct apples-to-apples comparison of the baseline regulation and new proposal, also often squelching opportunities for comment. They may seek to achieve a deregulatory outcome without the full process, disclosure, and reason-giving that ordinarily must accompany any notice-and-comment regulation and that longstanding Supreme Court precedents require when an agency changes policy. This article highlights problems with such deregulatory splintering, analyzes governing law, and also illuminates misunderstandings about deference regimes that are sometimes erroneously relied upon to justify deregulation via procedural shortcuts. Courts have generally rejected deregulatory splintering strategies, correctly noting how such deregulatory splintering violates both positive law requirements and central precepts about accountability and legitimacy in the administrative state.

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This article seeks to take stock of the Regulatory Accountability Act (RAA), a set of proposals to amend the Administrative Procedure Act (APA). House and Senate versions of the proposed Act have been pending in Congress since 2011, although the impending advent of Democratic control of the House may halt further progress on the bills in their present form. Some provisions in the RAA are desirable or at least supportable, because they would codify elements of current practice or make minor repairs to the APA. But other aspects of the bill are controversial and troubling. Among them are sections that would provide for (1) trial-type hearings on certain issues in proceedings to promulgate especially consequential rules; (2) mandatory findings and analyses in all notice-and-comment rulemakings; (3) judicially enforced requirements for cost-benefit analyses in major rulemakings; (4) curtailment of *Auer* deference; and (5) substantial evidence review of some major rules. The article examines some of the policy and drafting problems with these latter provisions. It concludes with some reflections on reasons why the RAA proponents headed in unproductive directions and how the process of APA revision could be improved in the future.

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